IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 633

FRANCIS P. SLATTERY,
Petitioner and Appellant,

v.

ALLAN A. MACDONALD, Sheriff of Ingham County,
Respondent and Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* ON APPLICATION FOR REHEARING

The American Civil Liberties Union, having just been informed of the issues involved in this case, joins with petitioner in strongly urging this Court to reconsider its denial of petitioner's application for a Writ of Certiorari. The American Civil Liberties Union takes this position because it earnestly believes that the case presents an important question affecting the liberty of the residents of the State of Michigan which should receive full consideration by this Court.

Petitioner has been sentenced to serve a term of sixty days in jail on a charge of contempt of court without having had any hearing whatever prior to the adjudication of contempt. The Courts of the State of Michigan, and now the Federal Courts as well, have approved this

result on the theory that petitioner's acts were committed in the presence of the court. We believe that the result arrived at in this case does not properly reflect the views which this Court has previously expressed and that this result was arrived at only by mechanical application of basic principles not a real understanding of them.

It is, of course, self evident that the very essence of due process is an opportunity to be heard. In no field, other than that of contempt, would this Court for a moment countenance a conviction where there had been no notice of hearing or trial and where one man was not only prosecutor, judge and jury, but the only witness as well.

Even in the field of contempt, it has long been recognized that there is a limitation upon the power of the courts to punish in the manner we have just described. In this connection, we suggest that there has been some confusion because of the fact that punishment for contempt of court is always summary. That is to say, punishment for contempt does not involve the ordinary process of indictment and jury trial. But because summary punishment of this kind is constitutionally permissible (*Eilen Decker* v. *Plymouth County,* 134 U. S. 31) it does not follow that it is constitutionally permissible to punish for contempt without any hearing of any kind except in the rarest of cases.

The permissible exception to hearings in contempt cases should be confined to actual necessity, that is only to cases in which the contempt is of such a character as to affect the ability of the court currently to transact its business. Chief Justice Taft expressed this view clearly in *Cooke* v. *U. S.,* 267 U. S. 517, at page 534, where he said:

> "To preserve order in the court room for the proper conduct of business, the court must act

> instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry,* 128 U. S. 289. It was there held that a court of the United States upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law."

Here again care must be taken to distinguish between those events which occur "in open court" and are of a character which justify punishment without hearing, those events which occur "in the presence of the court" and are of a character which justify punishment for contempt by summary process without trial by jury. In *Matter of Savin,* 131 U. S. 267, the contempt was of the latter character. There an order to show cause was issued and a hearing held on the charges.

But in the case at bar no order to show cause was issued and no hearing held. Yet nothing was done by petitioner, which within the language of Chief Justice Taft, could be described as consisting of "disturbance, violence, physical obstruction or disrespect to the court when occurring in open court". All that happened in the case at bar was that petitioner, with all possible respect for the court, persisted in stating that he could not remember whether certain events had occurred. He was

committed for contempt on the ground that this answer could not possibly have been a true one.

A case not unlike the case at bar was *Ex parte Hudgings*, 249 U. S. 378. There, as here, the witness was, after a hearing, adjudged guilty of contempt because he was unwilling to comply with the insistence of the judge that he answer a certain question positively. There, as here, the witness claimed that he was unable to remember. The events in that case, however, occurred in a trial in open court.

Nevertheless, this Court held that the conviction was unjustified because there was no basis for a finding that the witness' testimony constituted an obstruction to the performance of judicial duty. As Chief Justice White said, at page 383:

> "But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled.
>
> Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect."

These words are clearly applicable to the case at bar where the alleged contempt did not even occur in open court but in a private hearing where the judge was acting not as judge but as a grand jury. The rule of the *Hudgings* case has just been reaffirmed by this Court in *Ex parte Michael*, 90 L. Ed. Adv. 15, decided November 5, 1945.

We contend, therefore, that there was here no power to punish for contempt at all, much less power to punish for contempt without any hearing.

We respectfully submit that this case transcends in importance the particular case presented. The practice of one man grand juries is now well settled in Michigan. As an incident of that practice, punishment for contempt without hearing upon the basis of testimony offered before such one man grand juries has become common. This is a practice which strikes at the very heart of due process. It is a practice, which if not checked by this Court, may easily result in even graver infringements of liberty. These should be checked when they are first brought into the open. The occasion to perform a service in the cause of liberty is presented in this case. We respectfully urge this Court, therefore, to reconsider its previous refusal to hear the case.

American Civil Liberties Union,
Amicus Curiae.

Elmer H. Groefsema,
Walter M. Nelson,
Patrick Nertney,
Maurice Sugar,
of the Michigan Bar,

Osmond K. Fraenkel,
of the New York Bar,
Of Counsel.